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Court of Appeals
Division II
State of Washington

NO. 53127-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

GERALDINE A. MANIATIS LIVING TRUST, et al.,

Respondent/Cross-Appellant,

v.

MALKIT SINGH, et al.,

Appellants/Cross-Respondents.

Appeal from the Superior Court for Pierce County
Cause No. 16-2-11515-8

RESPONSE AND REPLY BRIEF OF APPELLANTS SINGH, RANJIT, MINCKLER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

State Rules

I. INTRODUCTION

Plaintiffs' responses to Defendants' appeal fail to provide any evidence to suggest that Defendants' construction activities caused the water on the Trust's Property. The evidence identified by Defendants that the water is the result of Tosch's failed drain line and unpermitted berm, is unrefuted. The evidence identified by Defendants showing the Trust Property experienced water before any wetland work by Defendants is unrefuted. The evidence identified by Defendants showing that the wetland always sloped towards the northeast is unrefuted. The Plaintiffs failed to provide any evidence that supports the trial court's findings of fact related to causation of the water on the Trust Property.

Plaintiffs also fail to put forth evidence to suggest that Defendants intentionally caused the water. In fact, the Plaintiffs do not even argue that it was Defendants intent to cause water on the Plaintiffs' property. Plaintiffs argue it is enough just to prove that Defendants intentionally engaged in construction. Plaintiffs concede that there is no evidence that Defendants intended to cause an injury to their land.

Plaintiffs also fail to identify evidence necessary to overcome the common enemy doctrine. The law and evidence cited by Defendants proving the water complained of is surface water, was unrefuted. Plaintiffs

present no evidence of a natural watercourse nor channelization of the water by Defendants to the Trust Property. Plaintiffs also cannot overcome the evidence presented by Defendants showing their due care in carrying out their wetland mitigation plan and drainage structures. The common enemy doctrine protects Defendants from liability, even if Plaintiffs had met their burden of proof to begin with.

II. CLARIFICATION OF FACTS PRESENTED BY THE TRUST

In an effort to distract from the lack of law, facts and evidence in the Trust's brief, the Trust attempts to paint Mr. Singh in a negative light, by including uncited accusations or suggestions about his business experience, financial status and motivations. The Trust is hoping to perpetuate the prejudice that the Singh family has experienced since moving into this neighborhood.

The truth is that Mr. Singh bought a property with a dilapidated house on a protected wetland that others before him did not want to work to restore. The prior owner allowed debris to pile up all over the property, including the wetland, and Mr. Singh cleaned it up. He then built two modest houses, one of which he and his family live in. He also transformed the yard from a junk yard to a beautiful wetland habitat. The work by Mr. Singh provides a great benefit to the neighbors, both in terms of property value and enhanced beautification. The Plaintiffs seem too

distracted by the color of Malkit Singh's skin to recognize the value he has brought to their neighborhood.

Defendants do not dispute that the Maniatis Property is experiencing more water now than in the past. They also do not dispute that the water is coming from the wetland. There is also no dispute that the wetland is hydrated by a spring that daylights on the Singh Property, a condition which predates the Singh ownership. However, the parties disagree about why the Trust Property experiences water in the corner of its property and whether the water creates a legal liability for the Defendants. Simply because Malkit Singh is the newcomer to the neighborhood, does not mean he is liable for everything that happens after he arrives. The Plaintiffs had the burden to prove that the Defendants caused the water – a burden they failed to meet.

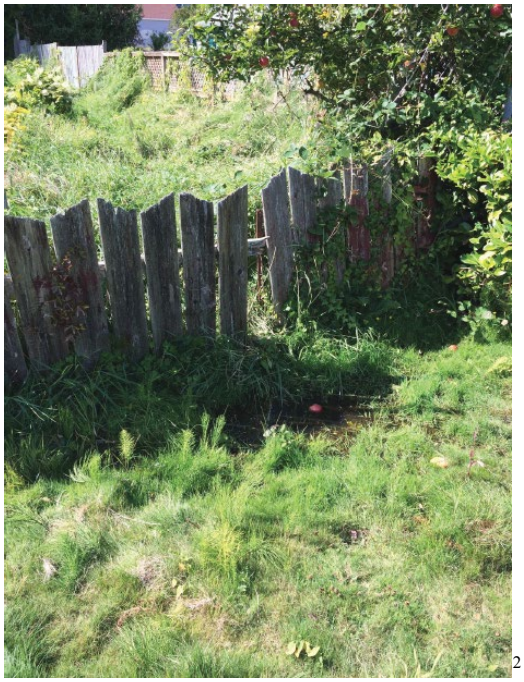
The Trust vaguely references a "diversion" or "channelization" of water from the wetland to the Trust Property, but fails to identify any diversion or channelization by the Defendants. In reality, the water is channelized to the *Tosch* property, has it had been for many years before Defendants ownership. That channel fails at the Singh/Tosch property line, thereby sending the water to the Trust Property.

There is simply no evidence that Defendants diverted or channeled water to the Trust Property, regardless of how many times the assertion is

made. Moreover, there is no evidence that Defendants changed the grade of the wetland to send water to the Trust Property. In reality the evidence shows the grade of the wetland always sloped down towards the northeast, both before and after the wetland mitigation work. And even if Defendants did change the grade of the land, that is within their right under the Common Enemy Doctrine.

On top of Plaintiffs' lack of evidence or logic to support their claims, Defendants presented compelling evidence to prove the Maniatis water complaints started before any wetland mitigation work began. The photo below, which accompanied Mr. Maniatis' August 24, 2015 complaint about the water, was taken before the wetland was graded and before the drainage system was installed. This evidence is completely unrefuted. [1]

[1] Ex. 146

 [2]

Without providing any explaination or connection to the water on the Trust Property, the Trust continually makes reference to the ongoing dialog between the City and the Defendants about the nature and scope of the construction and wetland mitgiaiton plan. Defendants do not dispute that the wetland restoration work was a very long and tedious process. That is why those before Mr. Singh gave up on the project. However, without providing any connection to the water complaints, this is just a red herring and an attempt to make Mr. Singh look bad, generally. The fact of the matter is that the construction, drainage and wetland mitigaiton work was approved and permitted and continues to be in compliance.

[2] Ex. 147

III. RESPONSE TO MANIATIS TRUST ASSIGNMENT OF ERRORS

A. No Err in Granting Reconsideration.

The Defendants' January 2, 2019 motion for reconsideration/ clarification was timely. The Trust conflates entry of a final judgment with entry of the court's findings of fact and conclusions of law. The former begins a 10-day deadline before which a motion for reconsideration must be filed. The latter starts no such deadline.

CR 59(b) requires that motions for reconsideration be filed within ten days after entry of the judgment, order or other decision. However, Findings of Fact and Conclusions of Law are not judgments or an order under CR 58 and there is no time limit on requesting revisions, reconsideration, or clarification until a judgment is entered under CR 58. There was no judgment nor final order in this matter at the time Defendants' filed their motion and therefore it was filed within the allowed time period.

Judgment in this matter was not entered until March 29, 2019. No Washington case has found that findings of fact and conclusions of law, on their own and without an entry of judgment, begin the 10-day deadline for a motion to reconsider. Instead, relevant case law states that the applicable timeline begins to run upon the entry of final judgment, and/or

"findings of fact, conclusions of law, *and* the entry of judgment." [3] The trial court filed its findings of fact and conclusions of law without a final entry of judgment on December 19, 2019. The court entered judgment on March 29, 2019. Nothing in the civil rules prohibits a party from bringing a motion for reconsideration *before* the entry of judgment, just as Defendants did. Consequently, Defendants filed their motion far before the deadline for reconsideration, as the 10-day clock had not yet started ticking.

In addition, a trial court retains jurisdiction to alter its findings of fact until ten days after the entry of a final judgment. CR 52(b) ("upon motion of a party filed not later than 10 days after the entry of judgment the court may amend its findings…"). Defendants requested that the trial court reconsider its findings of fact *before* the entry of judgment, and before any time limitation began. The pivotal action is the entry of judgment, not the findings of fact. Therefore, the trial court retained jurisdiction to amend its findings of fact and conclusions of law up until ten days after judgment was entered. Ten days after judgment was entered

[3] All relevant case law, including the law cited by Plaintiff Maniatis, pertains to an entry judgment and/or "findings of fact, conclusions of law, *and* the entry of a final judgment." *See Schaefco v. Columbia River Gorge*, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993) (noting that the "rule requires that a motion for reconsideration 'shall be served and filed no later than 10 days after the entry of judgment.'") (emphasis added); *In re Marriage of Tahat*, 182 Wn.App. 655, 672, 334 P.3d 1131 (2014) ("[O]ral or written opinions have no final and binding effect unless formally incorporated into the findings, conclusions *and judgment*.") (emphasis added).

was April 8, 2019. Defendant's January 2, 2019 motion for reconsideration was well within the appropriate timeframe.

Further, the process set by CR 52 makes it clear that Findings of Fact and Conclusions of Law are not a judgment or order under CR 58. CR 52(a) states that entry of a judgment under CR 58 is a separate process from stating findings of fact and conclusions of law under CR 52(a)(1):

> (1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

CR 52 specifically recognizes that judgements are entered under CR 58 and are therefore by rule separate from the findings and conclusions. In this case a judgment had not been entered and therefore the ten (10) day limitation for reconsideration did not apply to the Defendants' motion regarding the Court's Findings of Fact and Conclusions of Law.

Moreover, pursuant to CR 52(c), the trial court was required to provide Defendants with five days' notice of the time and place of submission of the proposed findings of fact and conclusions of law, prior to signing the findings and conclusions. In this case, the trial court violated this rule, by signing and filing the findings of fact and conclusions of law before providing any notice. This procedural misstep was recognized by

the trial court and is in part the reason the court did not find Defendant's motion to clarify/reconsider to be untimely.[4]

Finally, whether or not the court erred in considering the motion for reconsideration is inconsequential. On January 17, 2019, before the trial court amended its findings of fact and conclusions of law, Defendants filed a notice of appeal of the initial December 19, 2018 findings of fact and conclusions of law.[5] The award of attorneys' fees is a question of law, and is reviewed *de novo* by an appellate court. *McGuire v. Bates*, 169 Wn.2d 185, 206, 234 P.3d 205 (2010). Therefore, this Court would have reviewed the original findings *de novo*, without any deference given to the trial court's decision. The substantive briefing on the attorneys' fees issue remains unchanged by the trial court's decision to grant reconsideration, as the matter would have been before this Court in either situation. Therefore, the parties today remain in the same position as they would have been absent the trial court's review of the motion for reconsideration.

B. RCW 4.24.630 Does Not Apply.

The trial court did not err in ruling that Plaintiffs were not entitled to treble damages, fees and costs under RCW 4.24.630 because Plaintiffs

[4] January 25, 2019 Hearing Transcript, pgs. 4-5, 41.
[5] The Court of Appeals deemed this Notice of Appeal as premature, because a judgment had not yet been entered.

failed to prove intent to cause waste or injury, or physical entry onto the land by Defendants.

i. RCW 4.24.630 Requires a Showing of Intent to Cause Waste or Injury.

The Maniatis Trust's suggested interpretation of the statute is untenable and not supported by the law. The Trust is suggesting that liability for intentional trespass be imposed whenever someone acts intentionally, regardless of whether they knew or intend that act might damage another. Under the Trust's interpretation of the statute, there would be no negligent trespass – only strict liability. The Trust's suggested interpretation of the statute is not based on the plain language of the statute, but rather a strained reading of the language. The Trust's interpretation is also not supported by the case law.

The statute's plain language states that liability attaches when a person "*wrongfully causes waste* or injury to the land, or *wrongfully injures* personal property or improvements to real estate on the land" (*emphasis* added.) The defendant must wrongfully (i.e. intentionally) cause the injury. Plaintiffs failed to prove that Defendants intentionally caused waste or injury. As such, the statute does not apply.

The court cannot assume the legislature intended the statute to be read in the revised form that the Trust proposes. It is not an analysis of the

plain language of the statute when the Trust inserts language into the statute. The statute plainly says, "wrongfully causes waste" and "wrongfully injuries," and that is the controlling language.

The Trust's argument also does not find support in *Clipse v Michels Pipeline* as its' brief suggests. In fact, the *Clipse* court found that a showing of wrongfulness to cause waste or injury to property was required under the statute.

> "Clipse argues the term "wrongfully" applies only to the act of coming onto another's property and can be proved merely by showing the person lacked authorization.
>
> The contractors contend a person does not act wrongfully unless he or she acts intentionally, unreasonably, *and* while knowing or having reason to know he or she lacks authorization to so act. For reasons explained further below, we agree with the contractors.
>
> We first address Clipse's interpretation and find it entirely without merit. There is no way to read "wrongfully" as describing the mere act of coming onto the land. The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully* injuring personal property or real estate improvements on the land. By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. Presence on the land is required for all three. Thus, wrongfulness cannot refer to the mere act of entry upon the land." *Clipse v. Michels Pipeline Const., Inc.,* 154 Wn. App. 573, 577–78, 225 P.3d 492, 494 (2010).

Like the Trust, Clipse attempted to argue that the statute did not require a showing of intent to cause waste or injury. This argument is clearly rejected by the *Clipse* court.

The Trust's argument also does not find support in *Standing Rock Homeowner's Ass'n v Misich*, as the Trust's brief suggests. In that case, the defendant admitted he intended to cause the injury (destruction of the gates), but argued that he believed he had authority to do so. The Court found that it was unreasonable for the Defendant to think he had authority to destroy the gates and therefore found liability under RCW 4.24.630. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 23 P.3d 520, (2001).

The facts in *Standing Rock* are not analogous to the facts in this matter. Defendants Singh did not admit to causing the injury, intentionally or otherwise. The question in *Standing Rock* was not whether the Defendant did the wrongful act, or whether he intended to, but rather whether it was reasonable to believe he had authority to so act. As such, *Standing Rock* does not answer the question before the court: whether the statute requires an intention to cause injury, or just an intention to engage in an act that ultimately results in an injury.

Case law interpreting this statute clearly holds that liability under RCW 4.24.630 must be supported by a showing that the Defendant intended the injury or waste by his actions. *See Grundy v. Brack Family Tr.,* 151 Wn. App. 557, 571, 213 P.3d 619, 626 (2009) (holding that, where a Defendant raised their bulkhead and increased seawater splashed

Plaintiff's house, Defendant's intent to raise the bulkhead did not constitute the requisite intent for an intentional trespass claim); *Borden v. City of Olympia*, 113 Wn. App. 359, 374, 53 P.3d 1020, 1028 (2002)("By that statute's plain terms, a claimant must show that the defendant "wrongfully" caused waste or injury to land, and a defendant acts "wrongfully" only if he or she acts "intentionally." The evidence here does not support an inference that the City intentionally, as opposed to negligently, caused waste or injury to the Bordens' land."); *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895, 900 (2003) ("[T]he Colwells failed to show the requisite wrongful conduct—intentional and unreasonable invasion upon another's land committing acts of waste or injury.") See also, *Clipse v. Michels Pipeline Const., Inc.,* 154 Wn. App. 573, 577–78, 225 P.3d 492, 494 (2010).

Plaintiffs argue that because Defendants intended to engage in construction, that intention carries over to any consequence of the construction – intentional or not. This proposed application of the law is inconsistent with the plain language of the statute and contrary to the case law interpreting the statute. Because Plaintiffs did not present evidence to prove an intent to cause waste or injury, the trial court correctly held that RCW 4.24.630 does not apply and Plaintiffs are not entitled to their fees and costs.

ii. RCW 4.24.630 Requires Knowledge of Lack of Authorization to so Act.

The statute defines "wrongfully" when "the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act." Therefore, if the Trust's interpretation of the statute were correct - that the act, not the consequence - needs to be "wrongfully" then the Trust would also have to prove Defendants' intentional act (i.e. construction) was not authorized and Defendants knew or should have known there was no authority to so act. There was no evidence to suggest that Defendants were not authorized to engage in construction on their property.

iii. Maintaining a Distinction Between Negligent Trespass and Intentional Trespass is Not "Absurd."

The Trust asserts that the trial court's interpretation of the statute (which is consistent with the plain language of the statute and the case law) is absurd because people could just lie about their intentions and avoid liability under the statute. The Trust essentially suggests that the court should do away with negligent trespass. That is not the law and the result is not "absurd" as the Trust suggests.

The Trust claims the trial court's application of the statute would exonerate someone from liability under the statute if they bulldozed a neighbor's fence, so long as they did not intend the harm. However, in that

hypothetical the "act" and the "harm" are the same – bulldozing a fence. If this hypothetical actor intended to bulldoze a fence, he intended to cause the harm. The statute would provide liability under those circumstances.

The statute however would not impose liability where a neighbor was bulldozing their own property, hit a rock, causing the bulldozer to verve and take down the fence. In that case, there is an intent to bulldoze, but the injury was not intentional. The two situations are obviously distinguishable and should not, and are not, treated the same in terms of legal culpability.

The law simply does not impose the same consequences for damage inflicted intentionally versus negligently. The Trust is entitled to its opinion that the law is "absurd," but the trial court did not err in its ruling.

iv. Intent to Injure is also Required for Common Law Intentional Trespass.

The Trust would like to apply the standards for proving common law intentional trespass, while receiving the relief afforded to those who prove statutory intentional trespass. However, absent a contract, statute or recognized ground of equity, attorneys' fees cannot not be awarded as part of the cost of litigation. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.,* 126 Wn. App. 352, 358, 110 P.3d 1145, 1149 (2005).

Therefore, whether or not Plaintiffs can prove common law intentional trespass has no bearing on the court's denial of fees. Nonetheless, Plaintiffs also cannot meet the "substantial certainty" test of common law intentional trespass.

The case law defining the necessary intent for a finding of common law intentional trespass also requires an intent to cause harm. The case law simply extends the definition of "intent to harm" to harm that the Defendant was substantially certain would result from its intentional act. The trial court did not find that the Defendants had substantially certain knowledge that their construction would cause a harm to the neighbors. Therefore, even if the "substantial certainty" test was applicable to the statutory trespass analysis, the Defendants are not liable.

At trial and in its appeal brief, the Trust failed to provide any evidence that Defendants were substantially certain that their construction activity would cause harm to the neighbors. The Defendants' wetland mitigation plan contemplated an outflow point to the north, onto the Tosch Property. That plan was approved by the City of Tacoma. There was no evidence to suggest the Defendants knew the water would not flow onto the Tosch Property as designed. As explained in Defendants' Appellate Brief, the evidence suggests it was Tosch's actions and inactions that caused the water not to flow to the north as intended. Accordingly, the

trial court found that it was not Defendants' intention to cause harm to their neighbors, nor did they have reason to know harm would result from their actions.

The "substantial certainty" test has been applied only in cases where the allegation is common law, not statutory, intentional trespass. Nonetheless, even under the substantial certainty test, an intent to injury is still required. The only slight distinction is that the intent to injure can been inferred when the evidence shows the trespasser had reason to be substantially certain his actions would cause harm. Even under the substantial certainty test, Plaintiffs failed to prove intent to harm because there was no evidence to show the Defendants had reason to know, with substantial certainty, that their actions would result in harm to the neighbor.

v. Conclusions Consistent with Ruling.

On Defendants' motion for reconsideration, the trial court explicitly ruled that Plaintiffs were not entitled to their fees and costs pursuant to RCW 4.24.630.[6] The trial court found that a wrongful trespass did not equate to an intent to cause injury or waste. Therefore, the conclusion of "wrongful trespass" does not amount to relief under RCW 4.24.630. The court's conclusions of law support a denial of fees and the

[6] CP 1312-3

original conclusions of law were amended to remove the holding that entitled Plaintiffs to their fees under the statute. There is no question what the trial court's intention was in amending its conclusions of law.

It is completely disingenuous for the Trust to claim conclusions of law 9 and 10 support an award of fees under the statute. After the trial court issued its February 4, 2019 ruling on reconsideration, *the Trust* presented proposed amended findings of fact and conclusions of law to be consistent with the trial court's ruling. Conclusions of Law 9 and 10 were part of the Trust's February 6, 2019 proposed findings and conclusions.[7] If the Trust thought Conclusions of Law 9 and 10 were inconsistent with the trial court's findings, the Trust should have raised the issue at that time.

However, the Trust wanted to keep the alleged inconsistent conclusions of law in the record to use as a basis for appeal. On the same day the Trust filed its' proposed findings and conclusions, the Trust also served a motion for reconsideration of the February 4, 2019 ruling. The Trust's motion for reconsideration includes the following note:[8]

> Law. [NOTE TO TYLER: suggest leaving out findings conflict to avoid Murphy from changing findings of intent to complicate our appeal] [9]

[7] Appendix 015.
[8] Appendix 020.
[9] The copy of the motion emailed to counsel did not contain this note. Counsel for Defendants did not see this copy of the motion, until preparing this appeal brief. The name of the Trust's primary counsel is Tyler Shillito and the trial judge was the Honorable Edmund Murphy.

Clearly the Trust was aware of the alleged error but intetionally proposed the error in its' proposed findings of fact and conclusions of law in hopes that they could rely on the error later to support an appeal. The Trust strategically did not bring the issue to the trial court's attention and in fact suggested the language it now claims should work in their favor. This type of gamesmenship was typical from the Trust throughout this litigation. This alleged error was orchestrated by the Trust and the Trust should not be permitted to benefit from these actions.

vi. RCW 4.24.630 Requires Physical Entry by a Person and Wrongful Conduct on the Land of Another.

RCW 4.24.630 also does not apply in this case because the Defendants themselves did not commit a trespass and the alleged wrongful conduct did not occur on Plaintiffs' property. The statute clearly only applies when a person comes onto the land of another and commits wrongful conduct. Here it was only alleged that water trespassed onto Plaintiff's property as a result of Defendants' conduct on their own land.

RCW 4.24.630 states in pertinent part,

> (1) Every ***person who goes onto the land of another*** ***and*** who removes timber, crops, minerals, or other similar valuable property from the land, ***or*** wrongfully causes waste or injury to the land, ***or*** wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party... (***emphasis*** added.) [10]

[10] The Tosch brief purports to quote this statute but removes the controlling language of "goes onto the land of another and…". Tosch does not indicate in any way that she is

Our courts have unambiguously held that the statute will only apply in cases where the trespass occurred by a *person* who caused waste or injury by their wrongful conduct occurring *on the land of another*.

In *Colwell v. Etzell*, the court found that RCW 4.24.630 did not apply because there was not physical trespass. The *Colwell* court confirmed "[t]he statute's premise is that the defendant physically trespasses on the plaintiff's land." 119 Wn. App. 432, 438–39, 81 P.3d 895, 898 (2003). The *Colwell* court concluded that "RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon another's property, a commission of intentional and unreasonable acts upon another's property, and subsequent destruction of physical or personal property by the invader to another's property." *Id.* at 441. Pursuant to *Colwell,* an attorney fee award under RCW 4.24.630 is appropriate only where a tortfeasor has physically gone onto the land of another. See also, *Bowlby v. Williams*, 179 Wn. App. 1015 (2014) (unpublished, cited pursuant to GR 14.1). The Court in *Clipse v. Michels Pipeline Const., Inc.,* similarly held that RCW 4.24.630 only applies when the wrongful conduct occurs on the land of another. 154 Wn. App. 573, 577–78, 225 P.3d 492, 494 (2010).

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altering the plain language of the statute and apparently misquotes the statute in order to make it appear more favorable to the Plaintiffs' position. *See* Tosch brief pg. 15

In *Kave v. McIntosh Ridge Primary Rd. Ass'n*, Division 2 again confirmed the *Colwell* holding that RCW 4.24.630 does not apply to acts committed on the trespasser's own property. The *Kave* court acknowledged the plain language of the statute requires the alleged trespasser go onto the land of another. "This plain language imposes liability only on a person who 'goes onto the land of another.'" 198 Wn. App. 812, 823-4, 394 P.3d 446, 451-2 (2017).

In this case, the alleged trespass was not by a *person*, as the statute requires, but by water. For that reason alone, there is no liability under the statute. Further, the Defendants' alleged wrongful acts took place on their own property, not on the land of another. The statute and case law are clear that the trespass must be by a person and the wrongful conduct must occur on the property of another. Here, there is no allegation that the Defendants came onto the land, or that the Defendants engaged in wrongful conduct on the land of another. As such, there is no liability under RCW 4.24.630.

Even if RCW 4.24.630 applies when there is no intent to cause harm or waste, as the Trust argues, Plaintiffs are still not entitled to thier fees under the statute because they failed to prove physical entry and wrongful conduct by a person on the Plaintiffs' land.

C. The Trial Court did not Err in Excluding McCarthy Testimony.

The Trust cites to no law or rule that requires the trial court to treat each piece of evidence exactly the same. Clearly every witness or piece of evidence is going to have varying degrees of relevance and arises under different circumstances. The Trust fails to provide any context when arguing witnesses McCarthy and Fielder should to be treated identically.

On the eve of the February 2, 2018 trial date, the Trust brought a motion, on shortened time, to continue the trial date in order to add the Mincklers as Defendants. Defendants argued that the Mincklers were not necessary in the case, and even if they were to be added, there was no reason to delay trial. The Defendants also argued that if the Court were to continue the trial, that discovery should remain closed. The Court agreed to continue the trial, add the Mincklers and keep discovery closed, except as it related to the Mincklers.[11]

Despite this very clear ruling, the Trust asked its expert, Edward McCarthy, to conduct further investigation into the matter and formulate new opinions after February 2, 2018. The Trust likely did this in response to Defendants' motion in limine, which explained that Mr. McCarthy did not have the knowledge and/or expertise to provide his opinions and his testimony is based upon speculation only. This motion in limine by

[11] CP 885-7.

Defendants was filed and served before the February 2, 2018 trial date, but never ruled upon because of the Trust's motion to continue the trial date. Therefore, the Trust had Defendant's arguments and tried to use the trial continuance to fix their evidentiary issues. This is exactly why the Defendants asked the Court to keep discovery closed.

When the Trust tried to introduce these new expert opinions, which did not relate to the Mincklers, Defendants objected based on the fact the opinions were not disclosed until after discovery was closed. The trial court, using reasonable discretion, agreed with Defendants and limited Mr. McCarthy to opinions disclosed prior to the discovery cutoff.

The context of Mr. Fielder's testimony is notably dissimilar. Mr. Fielder, a civil engineer, was assisting Defendants with plans and permits for a potential drainage line to be installed on the Tosch Property. Mr. Fielder was working in the background to develop a plan in hopes that Tosch agreed to allow Defendants to fix her drain line, as was at one point contemplated, or the Court ruled that the Defendants had an easement on the Tosch property and could fix the drain line without her permission. Mr. Fielder was not necessary to Defendants' defense. He was attempting to assist in a potential settlement plan.

Mr. Fielder was hired to develop plans for a potential settlement and/or solution to the drainage problem. He was not hired to be a testifying

witness at trial. His testimony only became relevant because the Trust continually argued that the Defendants had done nothing to try to resolve the drainage issue once it became known to them. Mr. Fielder was only called in rebuttal to this argument made by the Trust at trial.[12]

The Trust fails show how the exclusion of some of Mr. McCarthy's testimony, or the admission of Mr. Fielder's rebuttal testimony, constitutes an abuse of discretion by the trial court simply because the trial court did not treat these witnesses exactly the same. The trial court has discretion to rule on each piece of evidence individually and in fact should consider the unique context of every piece of evidence offered. Moreover, even if the court did abuse its discretion, the error is harmless.

The Trust fails to show how these evidentiary rulings impacted the outcome of the case. The only issue the Trust is appealing is the trial court's finding that RCW 4.24.630 does not apply, as explained above. However, the testimony of Mr. McCarthy and Mr. Fielder is irrelevant to that question of statutory interpretation. Therefore, to the extent there was an error, it was harmless.

D. Plaintiffs are Not Entitled to Fees on Appeal.

Plaintiffs are not entitled to attorneys' fees on appeal because the underlying statue, RCW 4.24.630, does not apply. Because the statute

[12] Defendants did not know the Trust would be making the argument that Defendants did nothing to try to resolve the case because the argument was in such conflict with reality.

does not apply, Plaintiffs lack any basis for attorneys' fees on appeal. *Gunn v. Riley*, 185 Wn.App. 517, 532, 344 P.3d 1225 (2015) (reversing application of RCW 4.24.630 and consequently denying a request for attorneys' fees on appeal); *Colwell v. Etzell*, 119 Wn.App. 432, 443, 81 P.3d 895 (2003) (holding, because RCW 4.42.630 did not apply, plaintiffs "have no basis for attorneys' fees on appeal."). As explained above, the trial court properly denied Plaintiffs fees and costs for the underlying matter and Plaintiffs therefore are not entitled to their fees and costs by the trial court or the court of appeals.

IV. RESPONSE TO TOSCH ASSIGNMENT OF ERRORS

Tosch's appeal brief relies substantially on the arguments made by the Trust, addressed above. Below the Defendants will address those issues raised by Tosch and not argued by the Trust.

A. Response to Tosch Statement of Facts.

The Tosch brief is nearly absent of any reference to the record. Defendants will address only those inaccurate factual assertions that are relevant to the issues before the Court. By not addressing a factual misstatement by Tosch is not an acceptance of its truthfulness.

Without citing to the record, the Tosch brief refers to the wetland as a "significant slope." There is nothing in the record to suggest that the

wetland is a significant slope. The wetland has a slight grade towards the northeast, approximately where the Singh, Trust and Tosch Properties intersect. The evidence presented at trial proved that this grade was the same before and after the Singh construction activities.[13]

At no time was there a northernly pipe drawing water from the spring on the Singh Properties to the Tosch Property. Prior to Singh's ownership, there was pond on the property, which collected surface water. When the pond filled up, it overflowed and was led to the north/Tosch Property by a rock lined trench. That trench fed the water into the Tosch drain line.[14]

It was this system is what prevented water from draining to the northeast and reaching the Trust Property. During Singh's wetland mitigation project, he recreated this system, including a trench and rock-lined ditch to the Tosch drain line. However, due to lack of maintenance, the Tosch drain line fell into disrepair and Tosch built a berm along her property line, stopping the flow of water to the north. The water thereafter flowed with the historical grade of the land, to the northeast.

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[13] Ex. 111 (DEF 404, 413); Ex. 118 (DEF 581-584, 587); Ex. 11 (Maniatis 120, 132); CP 693-694 at Kluge Testimony; Brad Biggerstaff Deposition Published at Trial ("Biggerstaff Dep.") at pp. 84-87.

[14] CP 681-682 at FOF 13-16; *see also* CP 104-112 at Hallberg Testimony, CP 455, 551-552 at Kluge Testimony.

This historical distribution of water to the Tosch property pre-existed both the Singh and Tosch ownership and therefore the trial court found it did not constitute a trespass or waste. The trial court did not find that water was no longer flowing to the Tosch Property, as Tosch's brief suggests. The trial court found that to the extent water was flowing to the north, that was not a trespass or waste. As such, the injunction issued by the trial court only requires the abatement of water onto the Tosch Property if it is coming from the Trust Property.

Tosch's brief also complains of groundwater that is allegedly coming from the Singh Properties to the Tosch Property. However, there was no evidence presented at trial suggesting that there was a change in groundwater flow volumes or direction. This idea that the Tosch Property has more, or different groundwater since the Singh construction simply was not an issue at trial. Similarly, there was no evidence, or even accusation at trial that Singh "destroyed the wetland." The wetland was not even designated as such until shortly before Singh's ownership. The only work done in the wetland was mitigation work, as required and approved by the City of Tacoma.

B. The Trial Court did not Err in Finding the Water from the Defendants' Property to the Tosch Property did not Constitute a Waste or Trespass.

The trial court did not find that water was no longer flowing to the north/Tosch Property, as Tosch's brief complains. The trial court simply found that water had historically been diverted to the north/Tosch property and therefore it was not a trespass or waste for Singh to continue to divert the water in this direction. Indeed, Singh did continue this diversion to the north, but Tosch's failed drain line and berm did not allow the diversion to work properly, thereby sending the water down the natural grade of the land, to the northeast/Trust property.

Importantly, it is not disputed that historically water flowed north to the Tosch Property only because of a manmade diversion drainage system.[15] If the grade of the land naturally carried the water north to the Tosch Property, the diversion system, which predates Singh's ownership, would not have been necessary.

Defendants agree with Tosch that water continues to try to flow north to the Tosch Property. The evidence shows this flow is limited by the failed Tosch drain line and her berm. However, Defendants also agree with the trial court that this flow to the North does not constitute a trespass or waste.

Tosch's assignment of error seems to be a complaint regarding a finding the trial court did not make. The trial court did not find that the

[15] FOF 50, COL 3; CP 960-62.

water on the Tosch property was coming solely from the Trust property. Rather, the court found only the water coming from the Trust property was a trespass or waste. Tosch does not seem to be appealing the finding that water from the wetland to the Tosch property is not a trespass or waste. Tosch's brief does not put forth any evidence or argument to suggest that the water from the wetland to the Tosch Property should constitute trespass or waste.

Tosch requests that the injunction be amended to address the water flowing north to her property. She does not suggest what the amended injunction would look like. Should the Defendants be required to abate the flow of water in any direction? If that is the case, what is to be done with the water? Tosch correctly states that only Defendants' engineer has a plan for dealing with the water. Neither the Trust nor Tosch have suggested a solution. However, the Defendant's solution is to repair the Tosch drain line and remove her berm. This is the only solution proposed and is a solution to a problem caused by Tosch, not by Defendants. Defendants have no control over the solution, as the problem does not exist on their property and was not a result of their actions.

V. REPLY TO THE TRUST'S AND TOSCH'S RESPONSES

A. Defendants' Briefs Specify Findings Unsupported by Substantial Evidence and are Supported by Legal Authority and Citation to the Record.

The brief of Defendants Singh explains at length which findings of fact were not supported by substantial evidence, and why. Defendants Singh's brief references each finding at issue by number and the assignment of error is clearly disclosed in the associated issue pertaining thereto. Further, Defendants Mincklers' brief also provides these errors in more of a list format, which seems to be what the Plaintiffs believe is required. Importantly, the Plaintiffs clearly understand the matters at issue in Defendants' briefs and cannot credibly argue that it cannot ascertain the findings in dispute. Even if the Defendants failed to strictly comply with a procedural rule, the Plaintiffs are not prejudiced.

Contrary to the Plaintiffs' assertions, the Defendants also make many references to the record, where appropriate, to support their argument that the evidence does not support some of the findings. However, Defendants cannot cite to the record to support an absence of evidence. That is the whole point of Defendants' appeal – there was not evidence to support the findings. Defendants can only cite to the record when there is evidence contrary to the findings, which Defendants did.

However, if the evidence simply fails to exist, there is nothing for Defendants to cite to and reference to the record is not necessary.

The cases cited by the Trust in support of its arguments are clearly distinguishable. In those cases, the appealing party, "failed to provide more than a single sentence in his brief, and that without legal authority,"[16] or "indiscriminately assigned error to each of the trial court's 48 findings of fact,"[17] or cited "to neither the record nor any authority"[18] or "raise no legal issues."[19] Clearly those are not the circumstances before this court. The Defendants explicitly laid out which findings they dispute, cited to the record throughout the briefs and provided significant legal authority to support their positions.

Plaintiffs have no genuine issue interpreting the matters in dispute or the legal or factual basis for Defendants' appeal. Plaintiffs only asserts a general and broad accusation that Defendants have not followed the rules. It does not point to any assignment of error that is confusing, cite to any statement of fact that is not supported by citation to the record, nor point to a single argument unsupported by authority. If there is something more in particular that the Plaintiffs think the Defendants should have done, the Plaintiffs have not identified it. Plaintiffs fail to show how any perceived

[16] *State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371, 374 (2002)
[17] *In Re Santore*, 28 Wn. App. 319, 323, 623 P.2d 702, 705 (1981)
[18] *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418, 421 (2002)
[19] *Island Cty. v. Mackie*, 36 Wn. App. 385, 394, 675 P.2d 607, 613 (1984)

procedural or technical violations in Defendants' brief impact the merits of the appeal or prejudice the Plaintiffs.

B. Findings of Fact Not Supported by the Record.

Defendants believe that they adequately identified all findings of fact that were not supported by substantially evidence. However, to make it abundantly clear, Defendants will restate those findings here:

FOF No. 26: There is no evidence to suggest that the regrade of the wetland changed the topography of the wetland and/or caused the flow of water to change from a northerly direction to a northeasterly direction.[20]

FOF No. 35 & 36: There is no evidence to suggest that the water on the Maniatis Property comes from Defendants' drainage system. In fact, this is contrary to FOF No. 33 which explains the drainage system disburses the water into the wetland via a dispersion trench. There is also no evidence that the water flowing from the wetland to the Maniatis property constitutes a "stream."[21]

FOF No. 37: There is no evidence to suggest water was "diverted...by construction."[22]

FOF No. 41: The October 31, 2015 stop work orders were not specifically related to the water going onto the Maniatis Property.[23]

FOF No. 49: There is no evidence to suggest Defendants Singh altered a natural watercourse.[24]

FOF No. 50: There is no evidence to suggest more water from the spring is captured by the drainage system and there is no evidence that the water is being diverted to the Maniatis Property. There is no evidence of lack of good faith. [25]

[20] CP 954-55
[21] CP 956-57
[22] CP 957
[23] CP 958
[24] CP 959
[25] CP 960

C. Plaintiffs Had the Burden of Proof.

Without citing any legal authority, both Plaintiffs claim that their allegations are to be taken as true by the trial court so long as Defendants do not present evidence to rebut them. However, this is not the law. It was the Plaintiffs' burden to present substantial evidence to prove their claims.[26]

Moreover, Plaintiffs claim Defendants lacked evidence to support their positions simply because the Defendants themselves could not testify about the specifics of the Defendants' construction activities. Again, it was the Plaintiffs' burden to present evidence that Defendants' construction activities caused the water they complain of. Plaintiffs did not call any witness who could testify about what construction was done, when or how it may have caused the water. It is not the Defendants' job to put this evidence on for Plaintiffs.

The best evidence that Plaintiffs had to connect Defendants' construction to the water was a relation in time. However, even that connection was proved to be spurious when Plaintiff Maniatis was presented with his own photographs showing the water on his property prior to any work in the wetland.

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[26] CP 690, COL 2.

To the contrary, Defendants put on substantial and competent evidence to show that the water was coming onto the Trust's Property for a variety of reasons, all of which were out of Defendants' control. Most significant was the failure of the Tosch drain line and the berm on her property blocking the water from going north. Also contributing to the collection of water was the natural expansion or movement of the wetland to the east, groundwater from the Trust's own property, and the Trust's lack of roof runoff drainage control. The Defendants provided actual evidence to support these causes of the water, as opposed to Plaintiffs' speculative theory about the construction.

It is not necessary that the Defendant, Malkit Singh, himself have personal knowledge of the construction activities. There is no requirement that the Defendants' own testimony be the only evidence to support the defense. Whether Mr. Singh or the Mincklers were aware of the details of construction is irrelevant.

D. Plaintiffs Fail to Provide Substantial Evidence to Support Findings related to Causation.

Findings of fact 26, 35, 37, 49, 50,[27] which suggest that Singh's construction activity caused water to flow onto the Trust Property, are not

[27] CP 954-57, 959-60

supported by substantial evidence. As such, conclusion of law 4-15, 18-19[28] were made in error.

Substantial evidence to support the finding that Singh's construction caused water to change directions, towards the Maniatis Property, does not exist in the record. In response to these contested findings, Plaintiffs merely cited to testimony by Karla Kluge, wherein she says she saw Mr. Maniatis' property was getting soft in 2015. She specifically testified that she did not know the source of the water causing the ground to become soft.[29] The only other evidence Plaintiffs allege support the idea that Defendants' construction work caused water to be directed to Maniatis is again general testimony by Karla Kluge describing the wetland and neighboring properties becoming wet. She does not testify regarding the cause of the water or even suggest that it was redirected by Defendants. She only notes the presence of water.[30]

Plaintiffs cite to essentially random portions of the record to supposedly support the idea that something about the Singh construction caused the water. No witness ever testified as to why, how or when any action by Singh caused water to change directions or change in any way at all. Plaintiffs are hoping the court does not review the cited testimony and

[28] CP 962-64
[29] VRP 464: 13-19.
[30] VRP 472:9-473:3

instead blindly rely on Plaintiffs assertion that the testimony supports the findings. It does not. There is a reason Plaintiffs only provides citations, and not actual quotes. The record does not support the findings.

E. Plaintiffs Fail to Provide Substantial Evidence to Support Findings related to Intention or Wrongfully Action.

Without supporting findings of fact, the trial court concludes that Defendants acted wrongfully or intentionally in causing the trespass.[31] However, there is no finding of fact to suggest that Defendants' acted intentionally. Conclusions of law which are not supported by the findings of fact, are made in error. *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671, 674 (2005).

There are no findings to support these conclusions because there is no evidence that Defendants acted intentionally. Plaintiffs' responses also fail to present this evidence. In fact, Plaintiffs' merely argue that intention to trespass is not required, but that any intentional act will do.

F. Common Enemy Doctrine Applies.

i. The water at issue is surface water.

Defendants and Plaintiffs' experts, as well as Karla Kluge, testified or found that the water in question is surface water.[32] There is no dispute that the water in question emanates from a daylighted spring and therefore

[31] COL 9, 10, 13 and 14; CP 963
[32] Biggerstaff Dep. at pp. 26-27, 32-33, 45; CP 456, 551 at Kluge Testimony, CP 429, Ex.106 (DEF 227-228); Ex. 107 (DEF 233).

the law clearly holds that the water is surface water. *King Cty. v. Boeing Co.*, 62 Wash. 2d 545, 550, 384 P.2d 122 (1963) (Surface water is properly defined as "vagrant or diffused [water] produced by rain, melting snow, or springs.") See also, *Alexander v. Muenscher*, 7 Wash. 2d 557, 110 P.2d 625 (1941); *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 628, *as corrected* (Dec. 14, 1999), *amended,* 993 P.2d 900 (Wash. 1999.)

Plaintiff attempts to confuse the issue by arguing the *source* of the water is groundwater - meaning at one point in time the water was underground. However, once the water daylights, it is no longer groundwater. At the point of the alleged trespass, the water is surface water. There is no evidence to suggest otherwise.

The offending water also is not part of a natural watercourse. There is no evidence to suggest the water was ever traveling through natural banks or channels. The only evidence presented was that the water is dispersed into the wetland through a dispersion trench and then followed a manmade ditch to the Tosch Property – same as it had prior to the Singh ownership.

Plaintiffs cite to *Miller v E. Ry & Lumbar* for the idea that a natural watercourse, which temporarily turns into a swampy region, does not lose its characterization as a natural watercourse. However, in this matter, there is no evidence that the water in question was *ever* part of a natural watercourse. Indeed, the evidence showed that even prior to Singh's

ownership, the water always daylighted from a spring and spread across the wetland in a diffuse manner. Plaintiffs fail to point to any evidence to suggest Defendants diverted a natural watercourse.

ii. No Channelization by Defendants.

The supposed channelization that the Trust vaguely references is the alleged rivulet created overtime by the water's flow. It has never been alleged that Defendants' created this rivulet (or stream as the Trust calls it). To the extent the water has channelized overtime, it was not a result of Defendants' actions.

The Defendants dispersion trench similarly cannot be considered a channelization. The dispersion trench spreads the water in a diffuse manner, not in a channelized manner. Moreover, the trench releases diffuse water onto the Defendants' property, not the Plaintiffs' properties. No evidence was presented to suggest this amounted to collection and channelization onto the Trust Property by the Defendants.

iii. Defendants Exercised Due Care.

Plaintiffs claim the Defendants failed to exercise due care because they hired experts and professionals to carry out the wetland mitigation work. This is an absurd argument, as it would most certainly be an absence of due care if Defendants endeavored to take on this project themselves, with no knowledge or expertise in the area. The fact that the property

owners hired experts to ensure the mitigation work was done properly is not a lack of due care, but rather evidence of due care.

Confusingly, the Trust asserts that Defendants could have exercised due care by installing a drainage system that mirrored the flow of water before work began. However, that is exactly what Defendants did. Defendants' experts designed and installed a system that would carry the water to the historical outflow point onto the Tosch Property. This is what the City required and approved and what was implemented. However, Defendants cannot control how the actions or inactions by Tosch on her property affect this system.

The Trust does not point to any specific lack of due care that caused the water. The Trust generally points to the back and forth between the City and Defendants about what the wetland mitigation plan should look like. It's true that there were revisions to the mitigation plan, both by the Defendants and the City. However, ultimately, there was agreement to a plan, which was implemented and approved.

The Plaintiffs still complain of water, despite the City's approval of the Defendants' wetland mitigation work. Clearly the water cannot be related to any historic disagreements between the City and the Defendants -otherwise the plan would not be approved, or the Plaintiffs would no longer have water.

Plaintiffs primary argument to show a lack of due care is Plaintiffs' assertion that Defendants did not do enough, or the right thing, *after* learning about the water complaints by the neighbors. However, there is no evidence to suggest that the water occurred because of a lack of due care. As Defendants' evidence proves, there was extensive study and attention paid to the effect the construction and wetland mitigation work would have on water flow and specifically the neighbors. If the water occurred as a result of Defendants' action, it was not due to a lack of effort on Defendants' part.

G. Injunction.

The case law cited by the Trust does not stand for the position that a court may enjoin an ongoing water trespass "without unnecessary elaboration." The *Hedlund v. White* matter merely says that an injunction is an available remedy for water trespass if it's ongoing and damages are inadequate to compensate the aggrieved party. 67 Wn. App. 409, 418, 836 P.2d 250, 256 (1992). The Trust substantially misstates the law in its brief.

The Plaintiffs argue that if Defendants are incapable of complying with the injunction, then that is Defendants' problem, and they will just be held in perpetual contempt. The Plaintiffs would like the Court of Appeals to rule that injunctions do not have to be practical, possible or realistic to

be proper. Clearly, that is not the purpose of ordering an injunction and will not resolve the Plaintiffs' problem.

The Trust claims that Mr. McCarthy came up with an idea at trial to install a drain line at the border of the Singh and Trust Property lines. However, this "shoot from the hip" idea was not engineered or even investigated. He does not actually know if that would resolve the drainage issues. Moreover, there is no attention paid to whether the City would approve this, when the Defendants have been explicitly told to use the historical outflow point and are restricted from digging in the wetland. Further, the Defendants have no ability to connect to the Tosch drain line, nor ensure that drain line is operating properly. If the Tosch drain line is currently inundated at the intersection of these three property lines, how would channeling the water to that inundated spot do anything but make matters worse?

Mr. McCarthy's "solution" was just a speculative guess about what might be possible, but in reality, it cannot be carried out by Defendants, even if it were to work.

The injunction issued by the trial court does not order Defendants to do, or refrain from doing something in particular. Rather, the injunction requires the Defendants to accomplish a very generally defined goal to "abate the flow of water." This injunction language might be workable in

a case where the cause of the water was known or defined. Those are not the facts in this case. Plaintiffs, nor the trial court, can explain what is causing the water, but still assume it must be Defendants' fault.

The fact that the trial court and the Plaintiffs cannot identify a cause shows that Plaintiffs have not met their burden to prove that they are entitled to injunctive relief. If Plaintiffs had met their burden to prove causation, the injunction could simply order Defendants to do or not do something in particular. Instead, Defendants are left to figure it out. And the Defendants have figured it out – if Tosch were to repair and maintain her drain line and remove her berm, the wetland drainage would return to its pre-Singh conditions. While the Plaintiffs may not be required to devise an engineered plan to resolve the water, they are required to prove causation before they are entitled to an injunction.

Lastly, the Plaintiffs argue that the Court should not take into consideration the reasonableness of the injunction ordered because Defendants are not "innocent." However, Plaintiffs fail to point to any evidence that suggests Defendants knew their actions would cause a trespass. Again, there is no evidence of any action done intentionally to cause the trespass. Indeed, because Plaintiffs' cannot show an intent to trespass, the Trust spends a significant amount of its' brief arguing that intentional trespass does not require an intent to trespass.

Without providing any detail or analysis, Plaintiffs frequently reference the back and forth between the City and the Defendants during the wetland mitigation work. As explained, there is no correlation between the water and the revised wetland mitigation plans. The mitigation work was an ongoing discussion between the City and the Defendants, until ultimately everything was approved and is currently permitted and in compliance. There is no connection to the water and Plaintiffs do not even attempt to connect them.

H. Defendants Entitled to Fees.

i. Defendants Motion was Timely.

The trial court did not deny Defendants' motion for fees based on the alleged noncompliance with CR 54. In fact, the trial court's order denying fees specifically states that Plaintiff's CR 54 objection is denied.[33] This was not the basis for the trial court's denial of fees. Therefore, to confirm a denial of fees on that basis, this Court would have to find the trial court abused its discretion in ruling that CR 54 did not preclude Defendants from a fee award. The Trust has failed to meet this burden.

The Trust's reliance on CR 54 is misplaced. The March 29, 2019, order did not start the clock on Defendants' 10-day deadline because that

[33] CP 794-7.

order did not grant Defendants' right to attorneys' fees and costs or define the Defendants as the "prevailing party." Defendants would have had 10 days from when the trial court ordered Defendants were entitled to fees, before they were required to file their motion for specific fees and costs. Indeed, by the explicit terms of the statute at issue, Defendants were precluded from filing or communicating to the trier of fact their claim for fees until after the judgment was entered. Moreover, Defendants filed their note for motion on the first day possible, within 10 days of the underlying judgment.

In *Corey v Pierce County*, cited by the Trust, the underlying judgment in the action entitled Corey to attorney's fees, but Corey did not submit application for fees until more than ten days after the decision awarding Corey the right to fees. Similarly, in *Clipse v Commercial Driver Services, Inc,* the underlying judgment entitled Clipse to attorney's fees, but Clipse waited more than 10 days to move on that award. That is not the case here. Defendants did not yet have a decision or judgment entitling them to fees and costs. In fact, Defendants were explicitly precluded from making an argument for fees any sooner. Before Defendants can move for fees and costs, they need a ruling that they are the prevailing party, as defined by RCW 4.84.250. Until then, the trial

court has no facts or evidence to make a ruling on the reasonableness of Defendants fees.

Defendants' 10-day deadline to move for their fees and costs starts once they have an order entitling them to fees and costs. The Trust cites no authority to support the argument that Defendants' deadline starts before they are even awarded a right to fees.

Even if Defendants were two days late in filing their motion, The Trust failed to identify any prejudice. Defendants filed their note for motion just hours after the judgment was entered. That was the absolute soonest that Defendants could have communicated the offer of settlement to the trial court, pursuant to the statute. Moreover, the Trust was well aware of Defendants intention to file their motion since the time the offer of judgment was made on November 13, 2017. Indeed, RCW 4.84.270 explicitly requires the Defendants to put Plaintiff on notice of their intent to pursue attorney's fees - a requirement Defendants' met, and the Trust does not question.

The Trust cannot defeat Defendants' motion for fees merely by arguing there was a technical procedural defect without also showing some prejudice resulting therefrom. "CR 6(d) is not jurisdictional, and that reversal for failure to comply requires a showing of prejudice." *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 665, 709 P.2d 774, 776 (1985) citing

Brown, at 364, 617 P.2d 704; *Loveless v. Yantis,* 82 Wn.2d 754, 759–60, 513 P.2d 1023 (1973). "To establish prejudice, the party making the challenge must show a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority." *Zimny v. Lovric*, 59 Wn. App. 737, 740, 801 P.2d 259, 261 (1990). There is no meaningful distinction between the time requirement of CR 6(d) and CR 54(d). "The identification in CR 6(b) of specific time requirements in rules that cannot be enlarged strongly supports the conclusion that *Goucher* applies to the other time requirements of the civil rules." *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 23, 332 P.3d 1099, 1104 (2014).

To the extent there was a delay in filing the motion, it was the result of excusable neglect. Counsel for Defendants did not read CR 54(d) as applicable under these circumstances. It was counsel's understanding that they were not bound by the time limits of CR 54(d) until and unless they had a ruling awarding Defendants the right to pursue their fees. Indeed, the Trust failed to provide any case law to support its position that the time-limits apply before any ruling on fees has been made. If this was a mistake on behalf of counsel, it was an honest one, made upon a genuine and reasonable misapplication of the rules. It was within the trial court's

discretion to grant an extension of time, based on this lack of prejudice, if the trial court found that the motion was untimely.

ii. RCW 4.84.270 Applies Even when Equitable Relief is Sought

Defendants opening brief provides clear case law holding that RCW 4.84.270 applies even where equitable relief is requested - and granted – in addition to a claim for damages. That is the law. The fact that the Trust's counsel thinks this law is "absurd" has no precedential value.

iii. Defendants Offer was for Settlement of Damages Claims Only.

Defendants' Offer of Settlement explicitly offered to settle Plaintiffs' trespass, waste and nuisance claims only. The offer was not contingent on Plaintiff dismissing its cause of action for injunction. Plaintiff's complaint sets out injunction as a separate cause of action, distinct from trespass, nuisance and waste.[34] Plaintiff could have proceeded to trial on his injunction claim.

RCW 4.84.270 does not require that an offer of settlement be an offer to settle all claims. The slip opinion cited by the Trust also does not make that holding. In *Cooke v Twu*, the parties had counterclaims against one another. Twu requested her fees and costs after being awarded an amount in damages that was more than she offered to settle for in

[34] CP 1-5, 804-8.

negotiations. However, during those negotiations, Twu insisted that the settlement offer was contingent on the Cookes also dismissing their claim for injunctive relief. Contrary to the facts before the Court, Twu insisted that her offer should resolve the entire case, including equity claims, not just the damages claim. Twu was ultimately the prevailing party in terms of damages, but not injunctive relief. The Court found that because Twu made her offer contingent on settling the injunctive relief, she was not the prevailing party under RCW 4.84.260. *Cooke v. Chu-Yun Twu*, 448 P.3d 190, 193 (Wn. Ct. App. 2019)("Twu argues that the term "amount" in RCW 4.84.260 suggests that the statute applies only to monetary claims and so we should confine our analysis only to comparing the dollar amounts conveyed in each party's settlement offer, ignoring Twu's insistence that the Cookes also dismiss their nonmonetary claims"…. "Allowing a party to make settlement of a damages claim contingent on forfeiting another nonmonetary claim, yet ignoring that nonmonetary claim when analyzing RCW 4.84.260, runs contrary to the reasoning of *McKillop* and *Niccum* that the statute does not support segregating the various provisions of a settlement offer." … "What stymied settlement of the damages claim was not an unwillingness to pay on the small claim, but Twu's unwillingness to accept the Cookes' offer to pay *unless* they would also resolve the rest of the nonmonetary issues in her favor. The Cookes

were clear that they could not accept Twu's proposed height restriction, and they prevailed on that issue at trial. It would contradict the purpose of RCW 4.84.260 for Twu to obtain attorney fees and costs where an agreement could have been reached on her damages claim absent her refusal to compromise on an issue on which she ultimately lost.")

As cited in Defendants' opening brief, the case law allows for the application of RCW 4.84.270, even where damages claims are combined with equity claims. The *Cooke* case is clearly distinguishable because Defendants did not require that settlement of Plaintiffs' injunction claim be included in the settlement. Defendants explicitly excluded the injunction claim from their offer. Twu insisted that the injunctive relief be included in the settlement, whereas Defendants Singh specifically left out the injunctive claim from their offer.

iv. Defendants Provide Authority for Fees even where equitable relief is granted.

As cited in Defendants' opening brief, the Defendant in *Hansen v Estell* was awarded fees under RCW 4.84.250 even though the Plaintiff prevailed on a claim for equitable relief (a temporary restraining order). 100 Wn. App. 281, 289, 997 P.2d 426 (2000). Plaintiff's argument that there is no case where fees are awarded when equitable claims are lost, is therefore meritless.

The *Hansen* and *Kingston* cases explicitly state that a request for injunctive relief will not affect the applicability of the statute. Plaintiff cites no authority to the contrary. Plaintiff cites no authority that holds, or even suggests, that a favorable equity award precludes application of the statute.

v. The Reasonable Amount of Fees and Costs to be Awarded is an Issue for the Trial Court.

Whether the amount or type of fees requested by the Defendants are reasonable is not a question before this court. The question is whether the fee provision of RCW 4.84.250 applies in this matter. Plaintiffs do not even suggest what fees they believe are applicable or reasonable. This is not at issue before this court at this time.

Respectfully submitted this 8th day of November, 2019.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed by the law firm of SCHLEMLEIN FICK & SCRUGGS, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

On November 8, 2019, I served one true and correct copy of the foregoing document with this Declaration of Service on the following parties via the method(s) indicated:

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DATED this 8 November 2019.

s/ Lacey Georgeson
Lacey Georgeson, Legal Assistant

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IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

February 06 2019 4:15 PM

KEVIN STOCK
COUNTY CLERK
NO: 16-2-11515-8

Honorable Edmund Murphy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE GERALDINE A. MANIATIS LIVING TRUST,

Plaintiff,

v.

MALKIT SINGH and KAUR RANJIT, and the marital community composed thereof.

Defendants.

JAY and ELEANOR KERGER, and KIM TOSCH,

Plaintiffs,

v.

MALKIT SINGH and KAUR RANJIT, and The marital community composed thereof, and the CITY OF TACOMA, a municipal corporation, TYE MINCKLER and KATHERINE MINCKLER, and the marital community composed thereof,

Defendants.

CONSOLIDATED
No. 16-2-11515-8

[PROPOSED]

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING MOTION FOR RECONSIDERATION

THIS MATTER was tried before the undersigned Judge on August 6 - 16, 2018. The undersigned judge presided at trial. The Plaintiff Maniatis Living Trust was represented by its attorney, C. Tyler Shillito of Smith Alling, P.S. Plaintiff, Kim Tosch was represented by her attorneys, Elizabeth Powell and Amy Pivetta Hoffman. Defendants Malkit Singh and Kaur Ranjit were represented by their attorney, Colleen A. Lovejoy. Defendants Tye and Kathrine Minkler were represented by their attorney, Stephen Burnham.

The Court has reviewed the exhibits admitted at trial, heard the argument of counsel, and heard the testimony of the following witnesses on behalf of the parties:

1. Malkit Singh
2. Joe Hallberg
3. Katherine Minkler
4. James Maniatis
5. Trevor Perkins
6. Ed McCarthy
7. Steve Taylor
8. Nicholas Columbini
9. Karla Kluge
10. Geraldine Maniatis
11. Jay Berneburg
12. Terry Clark
13. Kim Tosch
14. Jim Harteau
15. Jana Magoon

16. Russell Bodge

17. Tye Minckler

18. Matt Simpson

19. Rex Humphry

20. Brad Biggerstaff

21. Frank Fielder; and

22. James Perrault

Being duly advised, the Court hereby enters the following:

I. FINDINGS OF FACT

1. Plaintiff Geraldine A. Maniatis Living Trust ("Plaintiff Maniatis") is the owner of the property located at 2702 N. Carr Street, Tacoma, Washington 98403 ("Maniatis Property").

2. Plaintiffs Jay and Eleanor Kerger are former owners of the property located at 2712 N. Carr Street, Tacoma, Washington 98403.

3. Plaintiff Kim Tosch is currently in possession and the owner of the 2712 N. Carr Street Property.

4. Defendants Malkit Singh and Kaur Ranjit ("Defendants Singh") are a married couple and are the owners of the property located at 2315 N. 27th Street, Tacoma, Washington 98403, and have been so, and in exclusive possession, since July 13, 2011.

5. Defendants Singh were the owners of 2307 N. 27th Street, Tacoma, Washington 98403 from the period of 2011-2018.

6. Defendants Tye and Kathrine Minkler are the current owners of the 2307 Property, which they purchased from Defendant Singh on January 22, 2018. Defendants Minckler took exclusive possession of the 2307 Property on January 22, 2018.

7. The Maniatis Property is located generally downslope from the 2307 and 2315 Properties (hereinafter referred to as the "Singh Properties"), with those Properties sloping down to the north and east toward the Maniatis Property and the Tosch Property.

8. The Tosch Property is located North of the Singh Properties, and the Maniatis Property. The Tosch Property is downhill from those properties.

9. There is a designated wetland and associated wetland buffer on the northern portion of the Singh Properties dating back to at least 2008.

10. The western portion of the Maniatis Property is a wetland buffer, including the northwest corner where water now pools.

11. The southern portion of the Tosch Property is a wetland buffer.

12. City and county critical area mapping locate a historic stream that traveled near the Singh Properties. The Singh Properties are downslope of a daylighted portion of the stream that is still in its natural form.

13. A natural spring has been located on the Singh Properties since at least the 1970s. The natural spring is feed by the upland drainage basin of north Tacoma. The water moving through the drainage basin daylights and outflows water at the natural spring on the Singh Properties after traveling through underground channels connected to the upland drainage basin of north Tacoma.

14. The natural spring was located in the crawlspace of a prior home located on the 2307 Property. The natural spring water flowed out of the crawlspace of the prior home during

the years of ownership by Joe Hallberg which, was from the 1970's through approximately 2007.

15. During Joe Hallberg's ownership of the Singh Properties, the spring water would flow from the crawlspace of the home located on the 2307 Property and enter a pond located approximately in the center of the two properties, and as further depicted by topographical lines on Exhibit 111, at its page 404. The pond was continually wet year-round and had a constant flow of water entering it from the spring. Water left the pond via a channel and ultimately a four (4) inch concrete drainpipe traveling to the north, depositing the spring and pond outflow on the Tosch Property, and not on the Maniatis property. At no time did the spring water or pond outflow reach the Maniatis Property during the years prior to 2015.

16. Joe Hallberg eventually sold the Singh Properties to Todd Bergman in 2007. At the time, the house on the property was dilapidated and the wetland had been designated by the City of Tacoma.

17. Due to the exitence of the wetland, Mr. Bergman had to obtain a Wetland Development Permit and implement a wetland mitigation plan prior to developing the Singh Properteis.

18. On behalf of Mr. Bergman, developer Mark Neely applied for the permit in April, 2008.

19. Notice of the Wetland Development Permit application was provided to all neighbors within 400 feet, including Plaintiff Maniatis and the prior owner of the Tosch Property, Hugo and Loretta Van Dooren.

20. Plaintiff Maniatis did not submit any comments or concerns regarding the permit.

21. In December, 2008, the Van Doorens submitted a concern regarding the historically pre-existing water coming downhill from the Singh Properties and sometimes flooding across their property and the property of their neighbors to the north. This clearly shows that the outlet of the water from the Singh Properties was to the north.

22. The Van Doorens confirmed they installed perimeter drainage before any development of the Singh Properties to control the pre-existing water flows onto the Tosch Property from the Singh Properties.

23. Prior to construction on the Singh Properties, there existed on the Tosch Property a perimeter drainage system that included two catch basis and a subsurface drain line that carried water to the street and into the City storm sewers. One catch basin was located on the Tosch Property, at the intersection of the Tosch and Singh Properties. The second catch basin was located farther east on the Tosch Property, at the intersection of the Singh, Tosch, and Maniatis Properties.

24. Prior to Defendants Singh's construction, the western catch basin on the Tosch Property was removed.

25. The wetland development permit was approved by the City of Tacoma Land Use Administrator on July 9, 2009. There were no appeals of this approval. The permit approval became effective on July 24, 2009.

26. Defendant Singh began construction in 2013 by demolishing the existing home located on the 2307 Property. Thereafter Defendants Singh also regraded both the buffer area and the actual wetland of the Singh Properties while constructing two single-family homes; one on the 2315 Property and the other on the 2307 Property. The regrade of the wetland and the buffer areas was done initially without a permit and without approval by the City of Tacoma.

The regrading done to the wetland and buffer areas destroyed the pond and drain system described above in paragraph 15. Ultimately, the topography of the wetland and buffer area was altered by the regrading, causing the flow of any water on the Singh Properties to change from a northly direction to an easterly direction onto the Maniatis Property.

27. The City of Tacoma conditioned development by Defendants Singh upon a mitigation plan to preserve the wetland.

28. Defendants Singh hired engineers to assist in the development of the wetland mitigation program.

29. Defendants Singh proposed a mitigation plan to the City of Tacoma in 2015 after regrading work had begun. Defendants Singh represented the mitigation plan proposed to the City would maintain, in large part, the integrity of the designated wetland and, importantly, included the wetland outflow point to the north, to the Tosch property, generally located between the 2307 and 2315 Properties. This was the flow pattern that had been established over the years.

30. Defendants Singh's mitigation plan proposed the installation of new drainage to carry water located on the Singh Properties to, or near, the prior wetland area and prior outflow point.

31. The City of Tacoma approved Defendant Singh's mitigation plan as proposed. The City of Tacoma's subsequent permit required compliance with all applicable laws and specifically precluded allowing uncontrolled water to affect neighboring properties.

32. Defendant Singh objectively and constructively knew of the requirements and limitations imposed by and through the permits and applicable code and law. In particular, Defendants Singh knew that water could not be directed onto the Maniatis Property.

33. Defendant Singh subsequently installed a variation of the approved drainage provided in the mitigation plan. The installed drainage includes a series of collector drains around and in the crawlspace of the home on the 2307 Property and in the specifically designed to collect the all of the spring water and direct it the adjacent wetland via a dispersion trench. The dispersion trench is designed to disperse the spring water on the edge of the wetland. The dispersion trench is located uphill from the Maniatis Property and terminates approximately ten feet from the Maniatis Property line. The home built by Defendants Singh on the 2307 Property is located directly on top of the historic natural spring, which is now captured in the extensive drainage system built by Defendants Singh.

34. During Defendants Singh's construction on the Singh Properties, in June, 2015, James Maniatis began to notice water ponding on the northwest corner of the Maniatis Property. He contacted the City of Tacoma and Defendants Sing, asking that the water be stopped.

35. The water flowing onto Plaintiff Maniatis' Property comes from the Singh Properties. More specifically, the water flowing onto Plaintiff Maniatis' Property comes from the drainage system installed by Defendant Singh which is fed by the natural spring on the Singh Properties. Although at times Defendants Singh has suggested that the water on the Maniatis Property was a result of the Maniatis downspouts on the Maniatis home, which are not tied into a drainage system, that suggestion is not believable given that the pond in the northwest corner of the Maniatis Property is still present in the middle of summer after months of little to no precipitation and that, even during the summer months, there is a very clear stream of water flowing from the Singh Properties onto the Maniatis Property.

36. From 2015 through trial, the diverted spring water flowed onto the Maniatis Property unabated; in fact, during the course of this lawsuit the flow of water has turned into a

small, and continuously running stream onto the Maniatis Property. The northwest corner of Plaintiff Maniatis' Property. The northwest corner of the Maniatis Property, since 2015, and at the time of trial, remained a year-round triangular pond. The ponded area on the Maniatis Property is unusable by the Maniatis Plaintiffs, and the areas adjacent to the pond are also very soggy all year round. The pond has a clear inflow point in the form of small stream from the Singh Properties and an outflow point down to the Tosch Property, which lies at a lower elevation. Prior to construction beginning on the single-family homes on Singh Properties no water or pond existed on the Maniatis property in any form.

37. In August, 2015, Defendants Singh became aware of the water which had been diverted onto the Maniatis property from the Singh Properties by construction. As a result, their Engineer, Brad Biggerstaff, offered to the City of Tacoma to place two wheelbarrows of dirt on the corner of the Maniatis property. At no time did the Defendants Singh or their agents make that offer to Plaintiff Maniatis. The two wheelbarrows of dirt would not have addressed the water flow, the ponding water, nor would it have provided any relief from the complained trespass.

38. The only other action taken by Defendants Singh to address the water flowing onto the Maniatis Property was for Ed Dorland to have a day laborer build a hand-dug berm along the mutual property line of the Singh Properties and the Maniatis Property in October, 2015. However, the berm failed to stop the water since it was not engineered, was not built out of the correct materials, and was not maintained. The waters that reached the berm were diverted to a lower outflow point onto the Maniatis Property. The construction of the berm was not permitted by the City of Tacoma and it has since been removed.

39. In the beginning of October, 2015, Plaintiff Tosch began to observe wet ground on her property in the area behind the Maniatis Property. She described the area as "wet, mucky, and muddy." At the end of October, 2015, Plaintiff Tosch observed water flowing onto her property from a new pond and trench that had been built by workers on the Singh Properties approximately a week earlier. The trench was in the northbound direction.

40. On October 31, 2015, during a heavy rainstorm, water came from the Singh Properties and went underneath her house, her front porch, and pooled in her front yard. Similar storms brought similar flooding.

41. The City of Tacoma issued Stop Work Orders on the Singh Properties on October 5, 2015, that were specifically related to the water going onto the Maniatis Property. Code violations continued on the Singh Properties despite these Stop Work Orders. As of November 5, 2015, there were multiple items that needed to be addressed including, but not limited to: removing foundation rock and installing crawl space drains per the original approved design and installing a rock lined v-ditch to prevent uncontrolled water affecting neighboring properties.

42. Following the issuance of the Stop Work Orders, Defendant Singh's agent, A.J. Bredburg, in a letter dated December 10, 2015, submitted a proposal to the City of Tacoma in an effort to have the Order lifted so he cold proceed with construction.

43. In response to the December 10, 2015, Karla Kluge from the City of Tacoma expressed concerns as it related to the Defendants Singh's proposal. Ms. Kluge concluded that the then-built conditions on site were not approved as they did not reflect any approved plan and it did not provide for the same wetland as was originally proposed. Ultimately the City of Tacoma lifted the Order on May 9, 2016, but the correspondence from the City made clear that

wetland flows must not affect neighboring properties. The City of Tacoma's permits and authority did not require or allow it to stop water flows to neighboring properties.

44. Following the May 9, 2016, letter from the City of Tacoma allowing Defendants Singh to proceed with construction, Defendants Singh did nothing to stop or abate the water flow onto the Maniatis Property.

45. Defendants Singh completed development of the properties and the wetland mitigation plan on August 28, 2017.

46. The City of Tacoma holds a beneficial interest in the Singh Properties pursuant to a Covenant and Easement on the Singh Properties that obligates the owners of the Singh Properties to maintain the private drainage system in accordance with the City of Tacoma Permit No. 40000225020 and authorized the city of Tacoma to inspect and repair the system if the owners of the Singh Properties fail to do so.

47. The City of Tacoma confirmed that Defendants Singh are in compliance with all permits including Permit No. 40000225020.

48. After Defendants Singh completed the wetland restoration work in 2016, the City of Tacoma required recording of a Preservation Easement on the Singh Properties for the benefit of the city of Tacoma that prohibits the owners of the Singh Properties from altering the surface topography and hydrology of the land, or causing any significant soil degradation, erosion, or siltation or pollution of any surface or subsurface waters, including but not limited to grading, excavation, removal of any soil, sand, gravel, rock or vegetation, except as required by activities expressly permitted by the City of Tacoma.

49. During the construction, Defendants Singh drastically altered the natural watercourse that has historically been in place on the Singh Properties.

50. Even if the water emanating from the natural spring on the Singh Properties is more properly classified as "surface water," the common enemy doctrine defense would not apply. Landowners are prevented from collecting water and channeling it onto their neighbors' land. More of the spring water was now captured by the various drains around the foundation of the 2307 Property and, instead of diverting it to the north as it had been for years, it was now being diverted to the northeast and onto the Maniatis Property. Defendants Singh did not act in good faith and avoid unnecessary damage to the property of others.

51. On January 22, 2018, Defendants Singh conveyed the 2307 Property to Defendants Minckler. The Mincklers have been aware of the water trespass claims of the Plaintiffs since they purchased the 2307 Property. The Mincklers have never, either before they purchased the 2307 Property or after, investigated the water in controversy in this case nor have they taken any steps to stop or divert the water in controversy in this case from the Maniatis Property. The Mincklers are parties to an agreement with Defendants Singh which requires Defendants Singh to honor any order of this court as it relates to the water in controversy.

52. In January, 2018, Defendants Singh's agent had a discussion with the City of Tacoma proposing a French drain to be installed on the Tosch property only. The proposal did not include a drain system on either the Singh Properties or the Maniatis Property. No permit was ever submitted to the City of Tacoma related to any French drain and no work physical has actually occurred on a French drain for the Tosch property.

53. To repair Plaintiff Maniatis' Property, after the water flow is stopped, will cost $500.00.

54. Plaintiff Tosch did not take any action to maintain the drain line on her property. Terry Clark, in his inspection report in March, 2015, recommended that Plaintiff Tosch have a

drain system specialist evaluate the site drainage. That was never done. Witnesses have testified that the drain line has failed due to the accumulation of dirt among the rocks. Plaintiff Tosch dug up her drain line in an effort to have water be captured by the trench.

55. Plaintiff Tosch has, however, also been getting water flowing onto her property from the Maniatis Property. This water originates from the Sigh Properties, goes in a northeasterly direction to the Maniatis Property, and then settles at the lower point on the Tosch Property.

56. Plaintiff Tosch is asking for Defendants Singh to pay for a new foundation for her home, but Plaintiff Tosch has failed to present evidence to prove when this damage to her foundation occurred and the specific cause of the damage. Likewise, Plaintiff Tosch has failed to present evidence to prove that any damage to the interior home was caused by any actions of Defendants Singh.

57. Plaintiff Tosch has suffered some damage to her property because of the water trespass through the Maniatis Property onto her property caused by Defendants Singh, but has not proven a specific dollar amount of damage.

58. Any conclusion of law in this section shall be properly treated as such.

II. CONCLUSIONS OF LAW

1. The Court has personal jurisdiction over the parties hereto, has subject matter jurisdiction, and is the property venue for proceeding.

2. The Burden of proof in this matter is by a Preponderance of the Evidence.

3. The water from the natural spring on the Singh Properties constitutes a natural watercourse. The common enemy doctrine does not, therefore, apply. Even if the Court determined that the daylighted spring water constituted surface water, the Defendants are not

entitled to the defense of the Common Enemy Doctrine. Landowners are prevented from collecting water and channeling it onto their neighbors' land. More of the spring water was now captured by the various drains around the foundation of the 2307 Property and, instead of diverting it to the north as it had been for years, it was now being diverted to the northeast and onto the Maniatis Property. Defendants Singh did not act in good faith and avoid unnecessary damage to the property of others.

4. By intentionally regrading the Singh Properties, excavating, installing a collector system to feed into the drainage system on the Properties and installing a berm, Defendants Singh unlawfully altered the flow of a natural watercourse and diverting the same onto Plaintiff Maniatis' Property and eventually onto Plaintiff Tosch's property

5. By intentionally regrading the Singh Properties, excavating, installing a collector system to feed into the drainage system on the Properties and installing a berm, Defendants Singh also channelized the flow of from the Singh Property onto Plaintiff Maniatis' Property and eventually onto Plaintiff Tosch's Property.

6. The water flowing from the Singh Properties through the drainage system constitutes a trespass onto Plaintiff Manaitis' Property and then onto Plaintiff Tosch's Property.

7. Defendant Singh's action caused the aforementioned, and ongoing, trespass. Alternatively, the drainage system on the Singh Properties continues an ongoing waste to Plaintiff Maniatis' Property and Plaintiff Tosch's Property.

8. Defendants Singh intentionally and unreasonably have committed acts while knowing they did not have authority to do so. Defendants Minckler have taken no action at all to address the issue.

9. Defendant Singh wrongfully caused the trespass onto Plaintiff Maniatis's Property and onto Plaintiff Tosch's Property.

10. Defendants Minckler have wrongfully caused the trespass onto Plaintiff Maniatis' Property and onto Plaintiff Tosch's Property.

11. Alternatively, Defendant Singh and Defendants Minckler owe a duty to Plaintiff Maniatis to avoid intentionally and/or negligently channelizing a flow of water from the Singh Properties onto Plaintiff Maniatis' Property and then onto Plaintiff Tosch's property.

12. Defendants Singh and Defendants Minckler breached the aforementioned duty by installing and continuing to permit the channelized flow of water from the Singh Properties onto Plaintiff Maniatis' Property and onto Plaintiff Tosch's Property.

13. The negligent and/or intentional channelization of water from the Singh Properties onto Plaintiff Maniatis' Property actually and proximately caused the damages complained of by Plaintiffs Maniatis and is continuing.

14. The negligent and/or intentional channelization of water from the Singh Properties onto Plaintiff Maniatis' Property and then onto Plaintiff Tosch's Property actually and proximately caused damages to the Tosch Property in the specific area north of the property line with the Maniatis Property and is continuing.

15. Alternatively, the unabated flow of water from the Singh Properties constitutes an unreasonable interference with Plaintiff Manatis' use and enjoyment of Plaintiff Maniatis' Property, and with Plaintiff Tosch's use and enjoyment of Plaintiff Tosch's Property.

16. Plaintiff Manatis holds a clear legal or equitable right to be free from the flow of water from the 2307 Property for the reasons explained above.

17. Plaintiff Tosch holds a clear legal or equitable right to be free from the flow of water from the Singh Properties through the Maniatis Property for the reasons explained above.

18. Defendants invaded the foregoing right held by Plaintiff Manaitis by and through the ongoing flow of water from the Singh Properties onto Plaintiff Manatis's Property.

19. Defendants invaded the foregoing right held by Plaintiff Tosch by and through the ongoing flow of water from the Singh Properties through the Manatis Property onto Plaintiff Tosch's Property.

20. Plaintiff Maniatis and Tosch therefore established a right to obtain injunctive relief and Defendants, at Defendants sole cost and expense, must abate the flow of water from the Singh Properties onto Plaintiff Maniatis' Property.

21. Because any work would have to take place in a wetland area or a wetland buffer, the City of Tacoma must be involved in any remedy to address this issue and must approve any actions proposed to be taken.

22. The wrongful trespass onto Plaintiff Maniatis' Property injured Plaintiff Maniatis' Property in the amount of $500.00 for repairs after the flow of water is stopped.

23. The wrongful trespass onto Plaintiff Tosch's Property injured Plaintiff Tosch's Property but the Court is not awarded any damages to Plaintiff Tosch because she has not proved an actual dollar figure for those damages.

24. Nothing in the permits provided by the City of Tacoma or any other municipal or state authority relieved Defendants Singh or Minckler of their obligation to comply with applicable Washington law as set forth in these findings of fact and conclusions of law.

25. Any finding of fact in this section shall be properly treated as such.

DONE IN OPEN COURT this ____ day of February, 2019.

_____
HON. EDMUND MURPHY

Presented by:

SMITH ALLING, P.S.

By_____
C. Tyler Shillito, WSBA #36774
Maura S. McCoy, WSBA #48070
Attorneys for Plaintiff Maniatis

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E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

February 07 2019 8:30 AM

KEVIN STOCK
COUNTY CLERK
NO: 16-2-11515-8

Honorable Edmund Murphy

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Defendants.

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v.

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Defendants.

CONSOLIDATED
No. 16-2-11515-8

PLAINTIFF GERALDINE A. MANIATIS LIVING TRUST'S MOTION FOR RECONSIDERATION

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Comes now, the Geraldine A. Maniatis Living Trust (the "Trust") by and through the undersigned attorney of record and herby move this Court to reconsider the letter ruling filed February 4, 2019 (the "Letter Ruling").

I. ANALYSIS[1]

The Trust brings this Motion consistent with CR 59. By rule, "any other decision or order may be vacated and reconsideration granted" by motion of the aggrieved party. CR 59(a). This Court should revise its Letter Ruling to conform with the prior entered Findings of Fact and Conclusions of Law entered December 19, 2018 and Defendants' liability under RCW 4.24.630.[2] The Trust brings this Motion on the following legal grounds:

1. As a matter of law, RCW 4.24.630 "wrongful" standard considers the intent to commit the underlying act, not commit the resulting waste like the Letter Ruling seemingly insinuates;

2. As a matter of law, consideration of an untimely CR 59 Motion for Reconsideration constitutes reversible error itself, merits of litigation aside.

A. As a matter of law, RCW 4.24.630 only requires intent to commit the underlying act, not necessarily an intent to case the waste or injury.

This Court's letter suggests the Defendants avoid culpability under RCW 4.24.630 because the Defendants did not "intentionally cause[] waste or injury to the Plaintiff's land." Letter Ruling at Pg. 1. This understanding conflicts with the plain language of RCW 4.24.630 and case law.

---

[1] Based on the familiarity of the Court with the underlying facts, this Motion dispenses of a factual recitation. Instead, the Motion focuses on issues of law.

[2] The Trust incorporates, for additional briefing, those points and authorities set forth in its initial Response to Reconsideration *filed* January 18, 2019 as though set forth in full.

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1. *RCW 4.24.630 imposes liability based upon the intent to commit the acts or acts that cause harm, not the actual harm itself.*

The plain language of RCW 4.24.630 attaches, as a matter of law, based upon intent to "commit[] the act or acts" not intent to cause the resulting harm. RCW 4.24.630. The statute, in operative part reads:

> Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or ***wrongfully*** causes waste or injury to the land, or ***wrongfully*** injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, ***a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts*** while knowing, or having reason to know, that he or she lacks authorization to so act.

RCW 4.24.630 (emphasis added). Substituting RCW 4.24.630's definition of "wrongful" with the word in the text of the statute reveals:

> Every person who goes onto the land of another and… [intentionally and unreasonably commits the acts or acts that] causes waste or injury to land, or [intentionally and unreasonably commits the act or acts that] injures personal property or improvements to real estate on land, is liable to the injured party…

RCW 4.24.630. Thus, as a matter of law, liability attaches because of the intent to "commit[] the act or acts" not intent to cause the resulting harm. This Court should, therefore, reinstate liability under RCW 4.24.630 consistent with its initial Findings of Fact and Conclusions of Law. [NOTE TO TYLER: suggest leaving out findings conflict to avoid Murphy from changing findings of intent to complicate our appeal]

2. *Case law, including that of Borden v. Olympia, 113 Wn App. 359, 53 P.3d 1020 (2002) comports with the above plain language.*

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The Letter Ruling, respectfully, seems to rely on a misunderstanding of RCW 4.24.630's elements. Namely, the Letter Ruling describes RCW 4.24.630's elements to require proof that the "Defendants' 'wrongfully' caused waste or injury to land, and that the defendant acts 'wrongfully' only if he or she acts intentionally." Letter Ruling at pg. 1.

Conversely, however, the Court of Appeals already established the component elements for a violation of RCW 4.24.630 in *Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492 (2010). There, the Court of Appeals opined: "RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts *and* knew or had reason to know that he or she lacked authorization." *Clipse*, 154 Wn. App. at 580 (italics in original).

Accordingly, as a matter of law, comparison of the Letter Ruling element's seems to conflict with the elements of RCW 4.24.630 stated by the Court of Appeals. Noted in *Clipse, supra*, liability attaches because the "defendant intentionally and unreasonably committed on or more acts" not intentioned to cause the resulting "waste or injury to land." *Compare Clipse,* 154 Wn. App. at 580 *to* Letter Ruling at 1.

Further, nothing in *Borden v. Olympia*, cited in the letter ruling and decided before *Clipse, supra,* alters that RCW 4.24.630's analysis looks to the intent to cause the trespassing act. *Borden v. Olympia,* 113 Wn App. 359, 53 P.3d 1020 (2002). There, "private developers built a new storm water drainage project on privately owned land." *Borden*, 113 Wn. App. at 363. The plaintiffs never alleged that the drainage project by the city diverted water onto the plaintiffs' property. *Borden*, 113 Wn. App. at 373. The Court found no trespass, negligent or otherwise, lied because the defendant never entered the plaintiffs' property. *Borden*, 113 Wn. App. at 373. Because no trespass occurred, the Borden Court held the "evidence here does not

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support an inference that the City intentionally, as opposed to negligently, caused waste or injury to the [plaintiffs'] land." *Borden*, 113 Wn. App. at 373.

Borden, supra, resolved on grounds other than "wrongfulness." Namely, unlike here, the city never directed water, or caused an entry, on the *Borden* plaintiffs' property. Therefore, nothing in *Borden* controls for the proposition that liability under RCW 4.24.630 requires intent to cause the actual and resulting waste. Instead, the elements from the later decided *Clipse*, 154 Wn. App. at 580, control. The Trust therefore requests this Court apply the test from *Clipse, supra* and impose liability if the Defendants "intentionally and unreasonably committed one or more acts *and* knew or had reason to know that he or she lacked authorization." *Clipse*, 154 Wn. App. at 580

3. Even if RCW 4.24.630 considered an intent other than to "commit the act or acts" under common law concepts, this Court can infer intent to cause the resulting harm.

Noted above, as a matter of law, the intent element of RCW 4.24.630 considers the intent to "commit[] the act or acts" not necessarily the resulting harm. However, even under an alternate standard, the Court could find intent by the Defendants to cause the underlying waste or injury. Adopted by our Supreme Court:

> Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

Bradley v. American Smelting & Refinery Company, 104 Wn.2d 677, 682, 709 P.2d 782 (1985). The Court continued and applied a "had to know" standard in analyzing intentional trespass. *Bradley*, 104 Wn.2d at 682 (holding smelter that released particulates "had to now" gravity would cause particulates emitted by smelter to land upon others' properties).

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IN this case, the evidence supports a finding that, to the extent central to RCW 4.24.630, that the Defendants "intentionally caused [the] waste" complained. The Defendants knew they constructed a drainage system. The Defendants knew they diverted water that otherwise flowed into the wetlands. The Defendants knew that the diverted water would, based on the law of gravity like in *Bradley* would "visit the effluence upon someone, somewhere." *Bradley*, 104 Wn.2d at 684. This Court should therefore, impose liability and conclude Defendants acted with culpable intent necessary to sustain liability under RCW 4.24.630.

B. <u>As a matter of law, this Court abused its discretion in considering the untimely Motion for Reconsideration.</u>

Alternative to the above, this Court should simply deny plaintiff's untimely Motion for Reconsideration. In *Metz v. Sarandos*, Division II of the Court of Appeals reversed the trial court and reinstated an order granting summary judgment when the trial considered an untimely Motion for Reconsideration. *Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998). Reversing the trial court, Division II wrote:

> CR 6(b) does not permit enlargement of the time for filing a motion to reconsider. Thus the trial court had no discretionary authority to extend the time period for filing a motion for reconsideration. *See Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wash.2d 366, 367-68, 849 P.2d 1225 (1993) (citing CR 6(b); *Moore v. Wentz*, 11 Wash.App. 796, 799, 525 P.2d 290 (1974)).
>
> Therefore, we reverse the trial court's grant of Metz' untimely motion for reconsideration and reinstate its original order granting summary judgment to Sarandos. We need not address appellants' remaining issues.

Metz, 91 Wn. App. at 360; *see also* CR 6(b) (applying ten day limit to CR 52(b) motions related to reconsiderations of findings of fact and conclusions of law). The Defendants filed for reconsideration on January 2, 2019 more than ten days' after this Court's entry of its Findings

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of Fact and Conclusions of Law on December 19, 2018. Consistent with Division II's controlling authority, this Court should likewise deny Defendants request for reconsideration.

II. CONCLUSION

This Court should reconsider its Letter Ruling and reinstate the liability of the Defendants under RCW 4.24.630 for the reasons stated herein.

DATED this 6th day of February, 2019.

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